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in the

Supreme Court

of the

United States

OCTOBER TERM 1981

LLOYD KYPTA,

Petitioner,

vs.

McDonald's Corporation, McDonald's System, Inc., and Franchise Realty Interstate Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW*

WHETHER CREATION BY A FEDERAL APPEALS COURT OF A TEST WHICH PRAGMATICALLY ELIMINATES TYING AS A PER SE ANTITRUST VIOLATION, AND WHICH AMOUNTS TO A DEPARTURE FROM THE PRIOR DECISIONS OF THAT COURT, OTHER FEDERAL APPEALS COURTS, AND THE SUPREME COURT, CREATES JURISDICTIONAL CONFLICT OR IS OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT CERTIORARI REVIEW.

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*The parties hereto are all identified in the caption to this Petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS and REFERENCE TO OPINION BELOW ii

TABLE OF AUTHORITIES iv

STATEMENT OF JURISDICTIONAL GROUNDS . viii

STATUTE INVOLVED ix

STATEMENT OF THE CASE 1

A. Proceedings Below 1

B. Facts 2

ARGUMENT

WHETHER CREATION BY A FEDERAL APPEALS COURT OF A TEST WHICH PRAGMATICALLY ELIMINATES TYING AS A PER SE ANTITRUST VIOLATION, AND WHICH AMOUNTS TO A DEPARTURE FROM THE PRIOR DECISIONS OF THAT COURT, OTHER FEDERAL APPEALS COURTS, AND THE SUPREME COURT, CREATES JURISDICTIONAL CONFLICT OR IS OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT CERTIORARI REVIEW 7

TABLE OF CONTENTS (Continued)

Page

A. The Challenged Decision 7

B. Conflict Among Decisions 8

C. Question of Great National Importance .. 24

CONCLUSION 26

CERTIFICATE OF SERVICE 27

APPENDIX

Decision below—*Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982) ..... App. 2

TABLE OF AUTHORITIES

Cases:	Page
Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), *cert. den.* 397 U.S. 920, 90 S.Ct. 928 (1970)	9
Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3rd Cir. 1977) *cert. den.* 434 U.S. 1086 (1978)	9
Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976)	9, 12, 13, 14
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404 (1962)	25
Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961), *cert. den.* 368 U.S. 931, 82 S.Ct. 368 (1961)	9
Eastern Rail. Pres. Conf. v. Noerr Motor Frgt., Inc., 365 U.S. 127, 81 S.Ct. 523 (1961), *reh. den.*, 365 U.S. 875, 81 S.Ct. 899 (1961)	25
Heatransfer Corp. v. Volkswagenwerke A.G., 553 F.2d 964, *reh. den.* 562 F.2d 1257, (5th Cir. 1977) *cert. den.* 434 U.S. 1087 (1977)	9
Hill v. A-T-O, Inc., 535 F.2d 1349 (2nd Cir. 1976)	9

TABLE OF AUTHORITIES (Continued)

Cases:	Page
International Business Machines Corp. v. U.S., 298 U.S. 131, 56 S.Ct. 701 (1936)	9
International Salt Co. v. U.S., 332 U.S. 392, 68 S.Ct. 12 (1947)	9
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705 (1959)	25
Kypta v. McDonald's Corp., 1979-2 T.C. ¶62,827 (S.D. Fla.)	2, 7, 8, 10, 13, 16, 17, 18, 24, 25, 26
Malcolm v. Marathon Oil Co., 1981-1 Tr. Cas. ¶63,954 (5th Cir. 1981)	18, 19, 20, 22, 23
Martino v. McDonald's System, Inc., 81 F.R.D. 81 (N.D. Ill. 1979) 1980-1 T.C. ¶63,218 (N.D. Ill. 1980)	12
Moore v. Jas. H. Matthews and Co., 550 F.2d 1207 (9th Cir. 1977)	9
Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976), *cert. den.* 429 U.S. 1097, 97 S.Ct. 115 (1977) *reh. den.* 430 U.S. 960, 97 S.Ct. 1612 (1977)	9, 12, 13
Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514 (1958)	9, 11, 17

TABLE OF AUTHORITIES (Continued)

Cases:	Page
Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960)	9
J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 101 S.Ct. 1923 (1981)	13, 20, 23
Perma Life Mufflers, Inc. v. Intern. Parts Corp., 392 U.S. 134, 88 S.Ct. 1981 (1968)	13, 14
Phillips v. Crown Central Petroleum Corp., 602 F.2d 616 (4th Cir. 1979), *cert. den.* 397 U.S. 920, 90 S.Ct. 928 (1970)	9
Photovest v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979), *cert. den.* 445 U.S. 917, 100 S.Ct. 1278 (1980)	9, 12, 13
Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980) *cert. den.* 451 U.S. 970, 101 S.Ct. 2047 (1981)	10, 11, 17, 24, 25, 26
Principe v. McDonald's Corp., 1982-1 Tr.Cas. ¶64,676 (E.D. Va., decision filed April 8, 1982)	11
Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *ce* 405 U.S. 955, 92 S.Ct. 1172 (1972)	9, 13, 16, 23

TABLE OF AUTHORITIES (Continued)

Cases:	Page
Susser v. Carvel Corp., 332 F.2d 505 (2nd Cir. 1964), *cert.* dismissed as improvidently granted, 381 U.S. 125, 85 S.Ct. 1364 (1965)	9
Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3rd Cir. 1976), *cert. den.* 429 U.S. 823, 97 S.Ct. 74 (1976)	9
United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S.Ct. 861 (1977) (*Fortner II*).	9, 13, 15, 16
Ware v. Trailer Mart, Inc., 623 F.2d 1150 (6th Cir. 1980)	9
Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002 (5th Cir. 1972) *cert. den.* 409 U.S. 1086 (1972)	9
STATUTES:	
§1, Sherman Act (United States Code, Title 15, §1)	1

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioner seeks review of the March 29, 1982, Judgment of the United States Court of Appeals for the Eleventh Circuit, in a matter in which petitioner herein was appellant and respondents herein were appellees.

Jurisdiction is conferred upon the Court under the United States Code, Title 28, §1254(1).

The decision under review is officially reported as *Kypta v. McDonald's Corporation*, 671 F.2d 1282 (11th Cir. 1982).

STATUTE INVOLVED

Section 1, Sherman Act (United States Code, Title 15, §1)

§1. Restraint of trade; resale price maintenance; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 [15 USC §45]:

Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, §3, 88 Stat. 1708.)

STATEMENT OF THE CASE

A. Proceedings Below

This is a claim of antitrust tying violation under §1 of the Sherman Act (United States Code, Title 15, §1), brought by a franchisee of McDonald's System, Inc. ("McDonald's System"), charging, *inter alia*, an unlawful tie-in whereby the franchisee is required to lease his business premises from an affiliate of his franchisor. The action was commenced in the United States District Court for the Southern District of Florida in April of 1973, with the filing of a Complaint in several counts alleging multiple violations of the federal antitrust laws. The original plaintiffs were Lloyd Kypta, petitioner herein, and Vincent Bottino (the latter settled his claims and is not a part of these proceedings). Kypta operates a McDonald's hamburger restaurant in Miami, Florida.

Defendants in the action below were McDonald's Corporation and two of its wholly owned subsidiaries, McDonald's System and Franchise Realty Interstate Corporation ("FRIC"). For convenience, all will be referred to collectively as "McDonald's," unless otherwise noted.

The action was brought pursuant to §§4 and 15 of the Clayton Act (United States Code, Title 15, §§15 and 25) to recover treble damages on behalf of plaintiffs and all others similarly situated by reason of defendants' violations of §§1 and 2 of the Sherman Act, and §§2 and 3 of the Clayton Act (United States Code, Title 15, §4 et seq.).

By its orally announced ruling of October 5, 1977, the trial court decertified all but one of the claims for

which class treatment had been initially sought and permitted. That one claim was Kypta's assertion that all members of the class were uniformly damaged by being forced, in effect, to make a loan to McDonald's of $15,000—the so-called "security deposit".

McDonald's was granted Summary Judgment on the real estate tie-in claim by Order of April 3, 1980, in which the trial court stated that even if an unlawful tie-in were assumed, plaintiff could not possibly establish any fact of damage.

An appeal was taken to the United States Court of Appeals for the Fifth Circuit. After that Circuit was split into separate circuits, the United States Court of Appeals for the Eleventh Circuit heard the matter and affirmed the District Court's decision in an Opinion dated March 29, 1982, reported at 671 F.2d 1282.[1]

B. Facts

The undisputed facts are correctly recited in the opinion here under review. McDonald's Corporation is one of the world's leading fast-food franchisors, with a chain of more than 5,000 restaurants world-wide. In 1965, a McDonald's subsidiary built a McDonald's restaurant on land purchased by that subsidiary in Miami, Florida.

The following year, McDonald's System sold a franchise license to Lloyd Kypta, authorizing his use of the McDonald's name and method of doing business for

[1]The text of that Opinion is included in the Appendix hereto.

a term of 20 years. Simultaneously with the sale of that license by McDonald's System, FRIC, another wholly-owned subsidiary of McDonald's Corporation, leased the premises to Kypta for a similar term. As a condition of obtaining the franchise, Kypta was required to become a tenant of FRIC by executing a lease agreement covering the subject premises. Since as far back as 1961, and perhaps earlier, McDonald's has imposed the same lease requirement upon all would-be franchisees. The franchise agreement requires payment of an initial franchise fee of $10,000, a site location fee of $2,500, and 2.2% of gross monthly sales thereafter. Under his lease with FRIC, Kypta was required to pay that subsidiary an additional 7% of monthly gross sales, as rent for the land and building. As a franchised tenant, Kypta also pays all taxes, insurance, up-keep and renovation charges.

In addition, Kypta is required under his FRIC lease to post a $15,000 security deposit, in return for which he receives FRIC's non-interest bearing, non-assignable promissory note. After 15 years, half of the deposit money is returned, with the balance refunded at the conclusion of the 20 year lease term. The franchise and lease agreements each provide that breach of one constitutes breach of the other.

It was not controverted that Kypta, in order to obtain a license from McDonald's System, had to be a tenant of FRIC. McDonald's in fact stipulated that the lease and license are offered together on a take-it-or-leave-it basis.

McDonald's spent nearly $116,000 to buy the land and build the restaurant which it then required Kypta to lease as a condition of being a franchisee. Because he

was precluded from owning his own land or building, Kypta never pursued the question whether he would have been able to do so, and is not now able to say what land or building he would have bought or constructed back in 1966. He did however testify by affidavit that funds were available to him with which he could have financed his own purchase of the land and building where his restaurant operations are now located, had McDonald's not prevented his so doing.

The trial court decided that Kypta could not prove that he had been injured—i.e., fact of damage—and summarily adjudicated Kypta's claims in favor of McDonald's. Expressed as dictum was the district court's belief that no violation has been established; the decision did not however turn on proof of violation. The amount of damage issue was not reached, because proof of any injury at all was found lacking. Kypta had also requested class action certification of his claims, on behalf of all others similarly situated; a class action, having previously been allowed with qualifications, was then decertified for the same reason, that Kypta had failed to show any injury for himself or any member of the class.

The court of appeals carefully avoided deciding whether a violation had been established, but affirmed the prior decision on the fact of damage issue. Having disposed of the case in that manner, the court of appeals correctly determined that there was no need to address the merits of the class action decertification, that issue having become moot.

The essence of the affirmance was that Kypta failed to show fact of damage because he failed to show that he was overcharged on the combined price of the

tying and tied products, and that he was therefore unable to show a net economic loss.

The decision of the court of appeals turned specifically upon what it found to be three failures of proof by Kypta, summarized as follows:

(a) He did not show that he could have afforded and found a suitable alternate location which would have been as profitable as the one McDonald's required him to lease;

(b) He did not show that the total, combined price charged under the lease with FRIC and the license with McDonald's System exceeded the total fair value of what he obtained under those agreements; and

(c) He failed to show that his payments for the license would have remained the same, had he not been required to lease the restaurant from an affiliated corporation.

In respect of the foregoing tests, Kypta argued unsuccessfully as follows:

(a) It is simply impossible, 15 years later, to say what might have been the profitability of some alternate location which might have been, but never was;

(b) The "net benefits" argument, combining the prices of tying and tied products, is irrelevant and, in any event, there was no evidence whatsoever as to what were the fair market values of either the tying or the tied products; and

(c) Whether McDonald's System might have charged a higher license fee, had FRIC not been the required lessor, is impossible to answer by anyone, and is in any event irrelevant.

To the contrary, urged Kypta, the requirement of proof of *some* injury is easily met by looking no further than the required $15,000 so-called "security deposit," which FRIC would not have obtained from Kypta, had it not enjoyed total monopoly power as the only recognized landlord of any McDonald's System licensee. While the amount of damage occasioned by this violation would necessarily be somewhat involved in its economic proofs, the simple fact of some damage is apparent from Kypta's loss of use of his $15,000 since he parted with it in 1966. McDonald's argued that the combined value of the lease and license to Kypta was so great that the detriment to Kypta of this lost use, if any, was more than offset by the benefit of being a McDonald's licensee. No proofs of any of these values were offered as to these jury questions, however.

The district court accepted McDonald's argument that the combined elements of its packaged deal are so attractive as to preclude any question of economic injury, *as a matter of law.* The court of appeals accepted that reasoning and affirmed.

ARGUMENT

WHETHER CREATION BY A FEDERAL APPEALS COURT OF A TEST WHICH PRAGMATICALLY ELIMINATES TYING AS A PER SE ANTITRUST VIOLATION, AND WHICH AMOUNTS TO A DEPARTURE FROM THE PRIOR DECISIONS OF THAT COURT, OTHER FEDERAL APPEALS COURTS, AND THE SUPREME COURT, CREATES JURISDICTIONAL CONFLICT OR IS OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT CERTIORARI REVIEW.

A. The Challenged Decision

The essential holding of *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir. 1982), is as follows (at 1285):

> "Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no injury can be claimed; suit, then, would be foreclosed."

The logic of this holding mandates the conclusion that any seller who requires the purchase of a second product, for which a non-competitively high price is exacted, will be free of prosecution under the antitrust laws for a claim of tying violation, if he simply affirms that his primary product is such a bargain that any loss experienced in the purchase of the second product is more than offset by the net economic benefits of the first and second, taken in tandem.

In addition, the decision here under review places upon the tying plaintiff the impossible burden of reconstructing history as it would have been, *but for* the claimed violation. The logic of these new tests mandates the conclusion that the tying plaintiff (a) assume facts which never existed and then adduce admissible proofs of what would have been the economic experience flowing from those non-existent facts, without indulging in speculation; and (b) prove what the defendant would have charged absent the violation, when the defendant is in exclusive possession of those facts and will obviously be less then impartial in what it reveals of those facts.

B. Conflict Among Decision

The impact of *Kypta* is to *actually*, not just effectively, eliminate tying as a *per se* violation of the antitrust laws, and to replace the old *per se* standard with a new rule of reason standard in all tying claims, but especially claims of franchise tying. The result is a conflict of mammoth proportions between this new rule and the rules which have been developed for use everywhere else—by this Court and by all of the courts of appeal which have considered tying claims brought pursuant to the antitrust laws, including the decisions of the Fifth Circuit rendered prior to the creation of the Eleventh Circuit, and which are therefore binding upon that newly created circuit. In the interest of brevity, the decisions of the several appellate courts with which

the case under review conflicts irreconcilably are set out in the margin, by footnote.[2]

The facts and the legal analysis in each are different but not distinguishable. In every one of the decisions cited in the margin, this Court and the courts of appeal for the several circuits concluded that the Sherman

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[2]*Supreme Court: International Salt Co. vs U.S.*, 332 U.S. 392, 68 S.Ct. 12 (1947); *International Business Machines Corp. v. U.S.*, 298 U.S. 131, 56 S.Ct. 701 (1936); *Northern Pacific Ry. Co. v. U.S.*, 356 U.S. 1, 78 S.Ct. 514 (1958); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861 (1977); and cases cited in text; *First Circuit: Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961), *cert. den.* 368 U.S. 931, 82 S.Ct. 368 (1961); *Second Circuit: Susser v. Carvel Corp.*, 332 F.2d 515 (2nd Cir. 1964), *cert. dis.* (as improvidently granted) 381 U.S. 125, 85 S.Ct. 1364 (1965), and *Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2nd Cir. 1976); *Third Circuit: Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3rd Cir. 1977), *cert. den.* 434 U.S. 1086 (1978), and *Ungar v. Dunkin' Donuts of America, Inc.* 531 F.2d 1211 (3rd Cir. 1976), *cert. den.* 429 U.S. 823 (1976); *Fourth Circuit: Advance Business Systems and Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. den.* 397 U.S. 920, 90 S.Ct. 928 (1970); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960); and *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979) *cert. den.* 397 U.S. 920, 90 S.Ct. 928 (1970); *Fifth Circuit: Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir. 1972), *cert. den.* 409 U.S. 1086 (1972); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Heatransfer Corp. v. Volkswagenwerke A.G.*, 553 F.2d 964, *reh. den.* 562 F.2d 1257 (5th Cir. 1977), *cert. den.* 434 U.S. 1087 (1977); and cases cited in text; *Sixth Circuit: Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980); *Seventh Circuit: Photovest v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. den.* 445 U.S. 917, 100 S.Ct. 1278 (1980); *Eighth Circuit: Northern v. McGraw-Edison Co.*, 542 F.2d 1336 (8th Cir. 1976), *cert. den.* 429 U.S. 1097, *reh. den.* 430 U.S. 960 (1977); *Ninth Circuit: Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th cir. 1971), *cert. den.* 405 U.S. 955 (1972), and *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977).

Act is still law, and that the conditioning of the sale of one product upon the purchase of another is unlawful when certain conditions precedent are met.

There is however one recent and remarkable decision with which *Kypta* not only does not conflict, but which is cited with approval in *Kypta*. That is the decision of the United States Court of Appeals for the Fourth Circuit in *Principe v. McDonald's Corporation*, 631 F.2d 303 (4th Cir.), *cert. den.*, 451 U.S. 970, 101 S.Ct. 2047 (1981). *Principe* involved a Virginia franchisee of the same franchise operation here involved. In that case, McDonald's argued that requiring a franchisee to lease his restaurant from FRIC, as a condition to obtaining a license from McDonald's System, was necessary to McDonald's being able to maintain its superiority in the field of franchising. This argument was accepted by the Fourth Circuit in a decision which turned on that single point, holding (at 309):

> "Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie in exists as a matter of law."

The logic of this holding mandates the conclusion that any seller who prepares a marketing formula, premised upon the condition that a second and more expensive product will be tied to the purchase of the first, will be free of prosecution under the antitrust laws if he simply affirms that he can not rise above the level of his competitors using any other business method.

The combined effect of *Principe* and *Kypta* is to suggest a very recent national trend in the federal

courts, amounting not simply to a departure but a complete reversal of all previously established precedent in the field of franchise tying litigation. While this Court previously denied certiorari in *Principe*, which therefore cannot itself be reviewed in this Petition, the joint impact of these decisions clearly demonstrates a new federal protectorate for franchisors—especially the larger of them—in which virtually anything goes. The significance of this trend as a matter of national importance will be discussed in further detail later in this brief.[3]

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[3]*After* this Court denied certiorari in *Principe*, there arose a dispute as to the taxation of costs. The district judge, in allowing virtually all costs requested by McDonald's, rendered a sweeping decision which is reported at 1982-1 Tr.Cas. ¶64,676 (E.D. Va., decision filed April 8, 1982). In that decision, Judge Warriner granted substantial costs to McDonald's because it had to defend "an extremely high stakes game" (at 73,674). Judge Warriner went further to disclose his thinking with the following statement (id.):

> "Prior decisions in the field had taken an unrealistic view of the business of franchising with decisions finding unlawful tying with little or no recognition of the fact that *without tying there is no franchise.*" (Emphasis supplied.)

The emphasized portion of the above-quoted passage may well be true. However, if it is true, and if the federal courts are to permit it, the decision of this Court in *Northern Pacific Ry. Co. v. U.S.*, 356 U.S. 1, 78 S.Ct. 514 (1958), and all tying decisions since that time, must either be rewritten, ignored, or overruled. In theory, the new trend amounts to a quantum leap, transporting tying violations from *per se* to rule of reason standards. In practice, this new trend assures that no franchisor charged with tying need fear an adverse judgment in the federal courts.

The decision under review ignores or merely gives lip service to a number of dispositive cases rendered by the Fifth Circuit (in a decision binding on the Eleventh Circuit), and two of its sister circuits, in *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Northern v. McGraw-Edison Company*, 542 F.2d 1336 (8th Cir. 1976), *cert. den.* 429 U.S. 1097, 97 S.Ct. 115 (1977) *reh. den.* 430 U.S. 960, 97 S.Ct. 1612 (1977); and *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. den.* 445 U.S. 917, 100 S.Ct. 1278 (1980). The essential holdings of these critical decisions, including the decision in *Carpa* rendered by the Fifth Circuit six years ago, are effectively overruled by the decision under review. Kypta offered evidence that he was charged an amount designated as "rent" which greatly exceeded fair value for the use of his restaurant premises.[4]

McDonald's argued, however, that there is no fact of damage because, even if rent is excessive, the cost of the license is so low that the combined value of the tying and tied products is a bargain. This argument was accepted *in toto* by the Eleventh Circuit. The theory is that a cheap tying product offers immunity from antitrust liability even if there is gouging on the

[4]As Judge Marshall described at length in *Martino v. McDonald's System, Inc.*, 81 F.R.D. 81 (N.D. Ill. 1979), McDonald's applies the same formula universally to all franchised restaurants resulting in an enormous markup by which McDonald's clears phenomenal profits on the differential between the rent charged its franchisees and its own cost of acquiring possession of the restaurant. In fact, on an average, rent generated from each restaurant pays McDonald's back for the entirety of its investment in about four years, with the remaining 16 years of the typical franchise representing pure profit. Although a successor judge later diluted portions of the decision reached by Judge Marshall, McDonald's did not in that case, nor in this, ever contest the accuracy of these bare facts.

tied product.[5] No case authority in support of this interesting view was suggested either by McDonald's or by the Eleventh Circuit.[6] The authorities on point are, in fact, all to the contrary; see *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861 (1977) (*Fortner II*); and *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (1971), *cert. den.* 406 U.S. 955, 92 S.Ct. 1172 (1972); as well as *Carpa*, *Northern*, and *Photovest*, *supra*.

The argument urged by McDonald's and accepted in *Kypta* concedes the violation, but credits some of the excess payment exacted for the lease against the

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[5]Indulging in McDonald's argument for a moment, defendants escape a tie-in finding *if* the license value, less the license cost, equals or exceeds the rental overcharge. Such a finding, however, requires evidence of the license value. The burden of proof was McDonald's but it offered no such evidence *whatsoever*. At best, had there been such evidence, it would have been a jury question, and the jury would of course be free to disbelieve McDonald's evidence on the point.

[6]McDonald's urged and the Eleventh Circuit accepted (*Kypta*, at 1285) a 1976 law review article written by a Harvard law professor, suggesting that this theory has merit. It is significant to note that this theory has never before been applied in this manner by any other federal appeals court *except* the Fifth Circuit, and that was in a decision which was later reversed by this Court, in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981). In fact, as will be noted in the text, the logic of this test has already been specifically found inadequate by this Court's 1968 decision in *Perma Life Mufflers*, *infra*.

license side of the ledger. The antitrust laws do not, however, permit the wrongdoer to invoke one aspect of the unlawful scheme to exonerate him from the damaging aspect. In *Carpa*, 536 F.2d at 50, the franchisor was found guilty of an unlawful tying arrangement. He nevertheless claimed entitlement to an offset for the reasonable amount of unpaid royalties which the franchisees owed under their agreement. The offset was disallowed by the Fifth Circuit as follows:

> "It is true that the *trademark was not illegal;* the collection of a *royalty is not illegal; the supplies were the tied item.* Nevertheless, the trademark was the linchpin of the whole arrangement. It was the factor upon which the entire illegal arrangement depended. We therefore see no error in [the trial court] *denying* the *collection of royalties* on its illegal use.
>
> "It is suggested that if the agreement to pay a 1% royalty on all sales was illegal the trademark owners are entitled to collect the reasonable value of the use of the trademark Since *equity aids only those who come into court with clean hands,* we do not consider ourselves free to adopt this suggestion." (Emphasis supplied)

This concept is called the "net benefits" theory, and it is not new. In *Perma Life Mufflers v. Intern. Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1968), this Court considered and rejected the notion that no damage would be allowed to a plaintiff who had himself garnered

profits even through his own violation of the antitrust laws.[7]

To support its theory, McDonald's argued out of context from *Fortner II*, where this Court commented on the relationship between the cheap tying product and the expensive tied product. That out-of-context argument was accepted by the Eleventh Circuit. What this Court stated in *Fortner II*, however, was that such an evaluation would be appropriate only if there were a failure to demonstrate sufficient economic power in the tying product market for there to be an unlawful tie-in. In fact, *Fortner II* twice affirmed that it was concerned with—and only with—the question whether the seller had sufficient economic power in the market for the tying product.[8] The distinction between *Fortner II* and the case here under review is critical. There is no issue here concerning McDonald's possession of

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[7]This Court noted in that case that plaintiffs had to accept the detrimental aspects to obtain an otherwise attractive business opportunity. Plaintiff's attempt to make the best of a bad situation, said the court, should not deprive him his right to recover under the antitrust law. If there are beneficial by-products, they can be taken into consideration in computing damages; the fact of damage, however, is no longer an issue by that point. The argument urged by McDonald's (but rejected by this Court in 1968), is that, even if McDonald's injured plaintiffs in their right pocket, plaintiffs benefited in their left pocket, and the net balance should equal exoneration to the seller. The Court was aware of this "net benefits" argument and rejected it, 392 U.S. at 141, n.5.

[8]429 U.S. at 613, 615. *Fortner II* does not even discuss the fact of damage issue; it accordingly affords McDonald's no support on the impact question in this lawsuit.

sufficient economic power in the market for the tying product (and had there been one, it would be a jury question). *Fortner II* simply does not stand for the claimed principle that the relative values of the tied and tying products may be blended, nor is there any other case authority in support of such a theory. To the contrary, *Fortner II* stands for the principle that, if the other requirements including economic power are met, the fact of damage inquiry *cannot* be thwarted by such a blending of claimed values. Obviously, the new theory urged by McDonald's and accepted in *Kypta* eliminates tying as a *per se* violation of the antitrust laws and, as above indicated, will eliminate as a practical matter there ever again being a finding of tying violation in franchising. Anyone charged with such a violation will urge that his excessive profit taking from the sale of the *tied* product was more than offset by the fact that he was such a beneficent seller of the tying product. There will then necessarily follow a protracted trial as to the value of the tying product, in virtually every case. Where plaintiffs are small and defendants are large corporate empires, the concept of antitrust law enforcement by private attorneys general will have been completely defeated.

In further support of its decision, the Eleventh Circuit in *Kypta* quoted (at 1285) a passage from the Ninth Circuit's decision in *Siegel*, which appeared to support the net benefits theory urged by McDonald's. A reading in context of that portion of the *Siegel* opinion, however (448 F.2d at 52), discloses that the opinion in *Kypta* misapprehends just what it was that the Ninth Circuit decided in that case. The relevant portions of that opinion read in context as follows:

"[Chicken Delight contends] that since the value of the tying items must be taken into account, as a matter of law appellees have suffered no injury. They reason that the value of the tying items has been conclusively evidenced by what the franchisees were willing to pay (in overcharges for the tied items) in order to get them."

"We cannot agree." The franchisees' apparent willingness to pay the ultimate cost of the arrangement is clouded by the fact that they may well have been unaware of what that cost would come to in practice. Had the full amount of the overcharge on the tied items been openly specified as the cost of the tying items, agreement might not have been forthcoming."

"*"Were [Chicken Delight's] position correct, there could never be treble damage recovery by tie-in purchasers, since damage could never be demonstrated.* This broad principle has already been rejected by this court, which has recognized the right of purchasers under illegal tying arrangements to collect treble damages for overcharges. * * *" (Emphasis supplied).

The Ninth Circuit's comment at footnote 11 is precisely the position here urged: acceptance of the net benefits theory eliminates treble damage recoveries by tie-in purchasers. This contradiction in philosophies between the Eleventh and Ninth Circuits brings into sharp focus the fundamental conflict between *Kypta* and the body of case law which had been developing from the time *Northern Pacific* was decided 24 years ago, up to last year's decision in *Principe.*

One of the more comprehensive analyses of fact of damage appears coincidentally in a recent Fifth Circuit case, *Malcolm u Marathon Oil Co.*, 1981-1 Tr.Cas. ¶63,954 (5th Cir. 1981), which specifically recognized:

> "* * * that there are often no neat dividing lines between the elements of proof required to obtain a damage award for antitrust violation. See Pollock, *The 'Injury' and 'Causation' Elements of a Treble-Damage Antitrust Action*, 57 Nw. U.L. Rev. 691,694-5 (1963) * * *" (at 75,942).

It is a further coincidence that the 1963 law review article referred to in the above quotation was authored by Earl Pollock, lead counsel for McDonald's in *Kypta.* Mr. Pollock's commentary on "fact of damage," written 19 years ago, candidly and effectively analyzes some of the difficulties faced in proving fact of damage, as the following excerpts demonstrate:

> "The 'injury' in the typical antitrust case is therefore *relative* in nature. No matter how thriving his business may be, no matter how large his rate of profit may be, no matter how impressive his annual report may be, the substance of his claim is that he would have been *better off* if the defendant's alleged misdeeds had never taken place." (at 694)
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> "* * * in many cases demonstrating that the plaintiff would have been *better off* may require a fairly extensive reconstruction of

history. Trying to figure out, for example, what *would* have happened over a period of several years to an industry price level 'but for' a price conspiracy might involve numerous variables—perhaps almost as many as trying to figure out what would have happened in the Civil War if Grant had not been given command or if the Union had not won at Antietam or Vicksburg."

* * *

"* * * 'fact of damage' * * * has no independent existence as an additional requirement binding on plaintiffs. 'Fact of damage' is nothing more than a deceptive label given to the 'injury' and 'causation' elements; and there would seem to be no reason in the statue or in logic why a stricter standard of proof should apply to those elements than the 'violation' element." (at 695)

Malcolm's examination of available literature in the field is comprehensive. It discusses a number of primary and secondary authorities in the antitrust field, and notes that legal scholars have questioned and by no means universally endorse the theories of Professor Areeda, upon whom McDonald's and the Eleventh Circuit placed exclusive reliance for the proposition that the *net value* of tied and tying products ought to be considered in determining whether fact of damage exists. *Malcolm* further discusses the obvious disadvantage faced by the plaintiff when virtually all of the pertinent information is in the hands of the defendant:

> "The defendant is not relieved of liability just because the plaintiff does not show the exact volume and price figures possible within the damage period. . . . . *'to hold otherwise "would enable [the defendant] to profit by [its] wrongdoing at the expense of [its] victim."'"* (75,948, emphasis supplied).

As a result, according to *Malcolm*, certain concessions must necessarily be made to the plaintiff attempting to prove the causation or fact of damage aspect of an antitrust violation:

> "Requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery.
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> * * *
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> "This relaxed standard is based on a recognition of the difficulty in reconstruction events that might have happened but for the defendant's unlawful conduct. It is appropriate that *if there is uncertainty, the defendant should bear the burden of that uncertainty because his unlawful actions created it.*" (at 75,952, emphasis supplied).

More recent than *Malcolm* is this Court's decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S.Ct. 1923 (1981), which includes an analysis by Mr. Justice Rehnquist of the fact of damage question in private antitrust suits. This Court there observed the basic requirement, which no one disputes, that the

plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. Petitioner in that case asked the lower court to consider the sufficiency of its evidence, which the court felt was weak, in light of the traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. Mr. Justice Rehnquist analyzed the history of that traditional "rule" as follows (101 S.Ct. at 1929):

> " 'Damage issues in these cases are rarely suspectible of the kind of concrete, detailed proof of injury which is available in other contexts. The court has repeatedly held that in the absence of more precise proof, the fact finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow vs. RKO Pictures, Inc.*, supra, at 264."
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> "The lower court thought the evidence too imprecise to support the award, but we reversed because the evidence was sufficient to support a 'just and reasonable inference' of damage. We explained that: "any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. *It would be an inducement to make wrongdoing so effective*

and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.'" (Emphasis supplied).

* * *

The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that *it does not come with very good grace' for the wrongdoer to insist upon specific and certain proof of the innury which it has itself inflicted."* (Emphasis supplied).

In concluding his analysis, Mr. Justice Rehnquist refined the traditional concept requiring proof of fact of damage by noting as follows (Id at 1930):

"* * * even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from his burden of proving antitrust injury and damages. *It is simply that once a violation has been established, that burden is to some extent lightened."* (Emphasis supplied)

Kypta was locked into renting his premises from McDonald's, and therefore did not search the market for alternate business premises in 1966 when he became

a franchisee. He therefore has absolutely no idea, nor does anyone else, what he *might have* been able to acquire by purchase or lease, nor has he the least idea what would have been the profits of that non-existent restaurant located at some hypothetical, alternate location. McDonald's argues nonetheless that proof of fact of damage must fail for lack of proof of those hypothetical and totally speculative "profits" at the alternate location which never existed. Fortunately, the cases impose no such burden upon antitrust plaintiffs, as was most recently articulated in *Malcolm* and *J. Truett Payne, supra.*

A similar strawman dilemma is created in McDonald's argument, accepted by the Eleventh Circuit, that elimination of the tie would require that the McDonald's licensing subsidiary increase its royalty fees. While that may be true, and while such an increase might even present a lawful alternative to the unlawful tying device now being used, the fact is irrelevant in a determination whether Kypta has been damaged by the tying device. Arguably, the trier of fact, when it determines the *amount* of damage, may ultimately believe McDonald's story. However, that is the province of the jury, not the court. For purposes of determining whether there has been an impact on Kypta, one need only determine whether he paid more for the use of the restaurant premises than he would have, absent a tie (see *Malcolm, Siegel,* and *J. Truett Payne, supra*).

McDonald's artful argument does not conceal the fact that Kypta dealt with FRIC, not voluntarily but because he was told he must; that he entered into a lease with FRIC; and that he was required under that lease to leave a $15,000 deposit with his landlord, evidenced by a non-interest bearing and non-assignable

note. Had these conditions not been imposed, the security deposit requirement could not have been enforced, and Kypta would today have had the use and benefit of his $15,000. The entirety of McDonald's argument, accepted in the *Kypta* decision, is that the adverse impact occasioned by that forced loan is lost in the welter of benefits. If there is any merit to that argument, however, it goes to the amount of damage, not to its fact. The conclusion is inescapable that, *but for* the violation which is here virtually conceded, Kypta would have had an additional sum of money which is calculable to the penny at prevailing interest rates, for the use of his $15,000 from 1966 to date.

C. Question of Great National Importance

The impact of franchising on American lifestyles and business is enormous. This Court can take judicial notice of the significant portion of the nation's gross national product which is generated through the franchised marketing of automobiles, oil products, hotels, fast-food, and many smaller industries. Until now, the franchising industry has been restrained under the antitrust laws from requiring additional purchases as conditions to the sale of desirable and attractive products, such as the initial franchises themselves. *Principe* and *Kypta*, however, have lifted that restraint and now eliminate the body of case law which holds tying unlawful.

The impact on franchising of the new rules announced in these two recent cases is enormous and incalculable. *Principe* holds in essence that tying is now lawful, and *Kypta* holds that, even if it is not yet lawful in the Eleventh Circuit, there is no practical way to prove a

tying violation. Radical departure from the body of precedent has always been grounds for this Court's intervention through certiorari. In *Eastern Rail. Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127, 135, 81 S.Ct. 523, 528 (1961), *reh. den.*, 365 U.S. 875, 81 S.Ct. 899 (1961), the Court took jurisdiction upon a finding that the case "presents a new and unusual application of the Sherman Act * * *." In this instance, a question of national importance is presented, since the logical consequences of *Kypta* and *Principe*, upon the entire field of franchising, will leave virtually no American untouched.[9]

[9] And see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404 (1962); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959) (important questions presented under the antitrust laws found by the Court to mandate its taking jurisdiction).

CONCLUSION

The decision in *Kypta* announces new rules which are totally at odds with the rules laid down by every appellate court to have considered these issues, *except* for the Fourth Circuit's decision in *Principe*. The decision in *Kypta* presents a question of great national importance and of the clearest conflict imaginable. This Court should accordingly take certiorari jurisdiction for a full review of the record and the merits of the decision below, on all issues raised in the appellate court.

Respectfully submitted,

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June 28, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition and Appendix were served this 28 day of June, 1982, upon: Alan H. Silberman, Esquire, Sonnenschein, Carlin, Nath & Rosenthal, 8000 Sears Tower, Chicago, Illinois 60606; and Laurence Schroeder, Esquire, Walton, Lantaff, Schroeder, Carson & Wahl, 922 Alfred I. DuPont Building, Miami, Florida 33131, Counsel for Respondents, by depositing same in a United States mailbox, with first-class postage prepaid.

John R. Kelso